

**38 CFR Part 3****RIN 2900-AR44****Presumptive Service Connection for Rare Respiratory Cancers Due to Exposure to Fine Particulate Matter**

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This rulemaking adopts as final, without changes, an interim final rule amending the Department of Veterans Affairs (VA) adjudication regulations to establish presumptive service connection for nine rare respiratory cancers in association with presumed exposure to fine particulate matter. These presumptions apply to Veterans with a qualifying period of service, *i.e.*, who served on active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War (hereinafter Gulf War), from August 2, 1990, onward, as well as in Afghanistan, Syria, Djibouti, or Uzbekistan, on or after September 19, 2001, during the Gulf War. This rulemaking implements a decision by the Secretary of Veterans Affairs that determined there is sufficient evidence to support these cancers as presumptive based on exposure to fine particulate matter during service in the Southwest Asia theater of operations, Afghanistan, Syria, Djibouti, or Uzbekistan during certain periods and the subsequent development of the following rare respiratory cancers: squamous cell carcinoma (SCC) of the larynx, SCC of the trachea, adenocarcinoma of the trachea, salivary gland-type tumors of the trachea, adenosquamous carcinoma of the lung, large cell carcinoma of the lung, salivary gland-type tumors of the lung, sarcomatoid carcinoma of the lung, and typical and atypical carcinoid of the lung. The intended effect of this rulemaking is to ease the evidentiary burden of this population of Veterans who file claims with VA for these nine rare respiratory cancers.

DATES: Effective date: This rule is effective [insert date publication in the FEDERAL REGISTER].

Applicability date: The provisions of this final rule shall apply to all applications for service connection for squamous cell carcinoma (SCC) of the larynx, SCC of the trachea, adenocarcinoma of the trachea, salivary gland-type tumors of the trachea, adenosquamous carcinoma of the lung, large cell carcinoma of the lung, salivary gland-type tumors of the lung, sarcomatoid carcinoma of the lung, and typical and atypical carcinoid of the lung based on service in the Southwest Asia theater of operations during the Gulf War, from August 2, 1990, onward, as well as Afghanistan, Syria, Djibouti, or Uzbekistan, on or after September 19, 2001, during the Gulf War, received by VA on or after April 26, 2022, or that were pending before VA, the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit on April 26, 2022.

FOR FURTHER INFORMATION CONTACT: Bryant Coleman, Regulations Analyst; Robert Parks, Chief, Regulations Staff (211), Compensation Service (21C), 810 Vermont Avenue, NW., Washington, DC, (202) 461-9700. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: On April 26, 2022, VA published an interim final rule at 87 FR 24421, to amend its adjudication regulations to establish presumptive service connection for nine rare respiratory cancers in association with presumed exposure to fine particulate matter. These presumptions apply to Veterans with a qualifying period of service, *i.e.*, who served on active military, naval, or air service in the Southwest Asia theater of operations during the Gulf War, from August 2, 1990, onward, as well as in Afghanistan, Syria, Djibouti, or Uzbekistan, on or after September 19, 2001, during the Gulf War. The 60-day comment period ended on June 27, 2022.

VA received nine comments from interested individuals and organizations. The comments are discussed below under the appropriate headings. VA made no changes based on comments received. However, we note that changes made to § 3.320 in the final rule for RIN 2900-AR25 are carried forward here and continue to remain in effect. Based on the rationale set forth in the interim final rule and in this final rule, VA adopts the provisions of the interim final rule as a final rule without change.

Confusion Regarding Qualifying Service Dates

VA received three comments that expressed confusion regarding whether service in the Southwest Asia theater of operations during the first Gulf War is included under the definition of the phrase qualifying period of service. VA agrees with these comments that the rulemaking could have caused some confusion, and acknowledges that additional clarity is needed. So, to clarify, as currently written, the rule applies to those who served in Desert Shield or Desert Storm as part of the Persian Gulf War from August 2, 1990 to February 28, 1991. We note that the definition of qualifying period of service contained in paragraph (a)(5)(i) refers to § 3.2(i), which defines “Persian Gulf War” as: “August 2, 1990, through date to be prescribed by Presidential proclamation or law.” However, VA makes no changes based on these comments because this issue was addressed in the final rule for RIN 2900-AR25, which changes have been carried forward here and continue to remain in effect.

General Comments

One commenter expressed general support for the rulemaking. VA thanks the commenter for their view. VA makes no changes based on this comment.

VA received two comments that addressed time frames and locations that qualify for the presumption of exposure contained in § 3.320. In particular, one commenter stated that he was on an aircraft carrier in the theater of Southwest Asia in July of 1987. He went on to state that “[a]ll Military Service-members should qualify for all exposures

during active duty in this theater of operations.” Another commenter asked “is this related to burn pits? If so, why are you just making this available to only veterans who served for that time period?” The commenter went on to state that they served in Beirut, Lebanon in 1982-1983 and were exposed to burning human waste during that time. While VA sympathizes with these commenters, VA’s rulemaking establishes presumptive service connection for nine rare respiratory cancers in association with presumed exposure to fine particulate matter; it does not address the locations or periods of service that qualify for the presumption of exposure to fine particulate matter. Thus, these comments are outside the scope of the present rulemaking.

Additionally, we note that the Secretary has made the decision to limit these presumptive conditions to a timeframe and locations during which VA has evidence of relevant levels of fine particulate matter in the air. When VA created the presumption of exposure to fine particulate matter in 38 CFR 3.320, it was based on scientific and medical studies that focused on the respiratory effects of fine particulate matter for Veterans who served in the Southwest Asia theater of operations, Afghanistan, Syria, Djibouti, and Uzbekistan during the Gulf War. Veterans began reporting a variety of respiratory health issues during and after the initial Gulf War conflict, and as a result, Congress mandated that VA study the health outcomes of veterans deployed to the Southwest Asia theater of operations. VA then requested the National Academies of Sciences, Engineering, and Medicine (NASEM) to study the evidence regarding respiratory health outcomes in veterans of the Southwest Asia conflicts. The results of that study formed the basis for this rulemaking. As service prior to the Gulf War was not considered in these studies, it cannot be included as part of the qualifying timeframe under 38 CFR 3.320.

While this rulemaking is based on current medical and scientific evidence related to the respiratory health effects of fine particulate matter on Veterans who served during

the Gulf War, VA will continue to review new scientific evidence as it develops relating to other exposures and to all health effects resulting from exposure to fine particulate matter. This rulemaking does not limit the future establishment of presumptive service connection for conditions related to respiratory or other body systems, or the establishment of presumptions of exposure for service in other locations or during other time frames. Additionally, VA encourages all Veterans who believe that they are entitled to VA compensation to file a claim with their local VA regional office. VA makes no change to the final rule based on the comment.

One commenter reported that they had filed 3 intent letters and had not received a response. The commenter went on to report that they had been turned down for compensation in the past. VA's rulemaking establishes presumptive service connection for nine rare respiratory cancers in association with presumed exposure to fine particulate matter. This comment, which relates to an individual case, is outside the scope of the present rulemaking. However, VA encourages all Veterans who believe that they are entitled to VA compensation to file a claim with their local VA regional office. VA makes no change to the final rule based on the comment.

One commenter stated that her husband served in the US Army and while serving he died of squamous cell carcinoma of the larynx. While VA sympathizes with this commenter, VA's rulemaking establishes presumptive service connection for nine rare respiratory cancers in association with presumed exposure to fine particulate matter. This comment refers to a specific case, which is outside the scope of the present rulemaking. However, VA encourages all Veterans and dependents who believe that they are entitled to VA compensation to file a claim with their local VA regional office. VA makes no change to the final rule based on the comment.

Another commenter objected to the rulemaking because it did not cover all diseases and disabilities caused by open air burn pits or the chemical contamination in

Gulf War I. Additionally, the commenter stated that the “interim final rule does not clearly define the provisions attaching to Gulf War I. Including coverage dates would eliminate any possible confusion.” As noted above, while this rulemaking is based on current medical and scientific evidence related to the respiratory health effects of fine particulate matter on Veterans who served during the Gulf War, VA will continue to review new scientific evidence as it develops relating to other exposures and to all health effects resulting from exposure to fine particulate matter. This rulemaking does not limit the future establishment of presumptive service connection for conditions related to respiratory or other body systems, or the establishment of presumptions of exposure for service in other locations or during other time frames. Also, the potential confusion regarding service during the first Gulf War was addressed in the final rule for RIN 2900-AR25, which changes have been carried forward here and continue to remain in effect. VA makes no change to the final rule based on the comment.

Further, we again note that changes made to § 3.320 in the final rule for RIN 2900-AR25 are carried forward here and continue to remain in effect. Additionally, provisions of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, Public Law 117-168, relevant to this regulation will be the subject of separate and future rulemaking.

Administrative Procedure Act

This document affirms the amendment made by the interim final rule that is already in effect. The Secretary concluded that, pursuant to 5 U.S.C. 553(b)(B) and (d)(3), there was good cause to publish this rule without prior opportunity for public comment and good cause to publish this rule with an immediate effective date. Delay in the implementation of this rule would have been impracticable, unnecessary, and contrary to public interest, particularly to Veterans.

Executive Orders 12866, 13563, and 14094

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is not a significant regulatory action under Executive Order 12866, as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). The certification is based on the fact that no small entities or businesses determine service connection or the rating criteria, or assign evaluations for disability claims. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of sections 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act (PRA)

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Assistance Listing

The Assistance Listing numbers and titles for this rule are 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.105, Pension to Veterans, Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, and Veterans.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, signed and approved this document on August 24, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Jeffrey M. Martin,

Assistant Director,

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

PART 3 – ADJUDICATION

The interim final rule amending 38 CFR part 3 which was published at 87 FR 24421 on April 26, 2022, is adopted as final without change.

[FR Doc. 2023-24195 Filed: 11/2/2023 8:45 am; Publication Date: 11/3/2023]